

THE EXEMPTION OF LIFE INSURANCE AND THE CONFLICT OF LAWS

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As the title indicates, this essay¹ will investigate a thoroughly domestic problem. The locale is the United States; the subject matter is institutional (life insurance and law); the problem entirely man-made: it arises out of the Balkanization of laws affecting a business which is continental in scope.² Put it this way: the subject matter of the economic activity in question, life insurance, operates uniformly over the entire continental area of the country. The human needs which the institution services are uniform. The operating media of the business are no different in Connecticut, Wisconsin, Iowa or New York. The laws *are* different. Accordingly, the problem is akin to those which have afflicted people wherever a geographic unity is disturbed by illogical spheres of nationality. Hence, "Balkanization".

The problem³ develops in phases. The first depends, naturally, on the growth of the economic institution. Before the middle of the nineteenth century life insurance, as an economic factor, was negligible.⁴ With the enactment of Verplanck's law in 1840,⁵ enabling wives to insure their husbands' lives, and its subsequent overflow into the mold which permitted anyone to insure his or her life for the benefit of third persons, came the legal authorization for the type of economic activity with which we are most familiar. The business of insurance depends

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1. This is a continuation of the author's inquiries in the field of creditors' rights, more particularly, into life insurance as an asset subject to the claims of creditors.

2. On the gigantic size of the institution, see: INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER; TEMPORARY NATIONAL ECONOMIC COMMITTEE: *A Study Made Under the Auspices of the Securities and Exchange Commissions for the T. N. E. C.*, Seventy-sixth Congress, Third Session, Pursuant to Public Resolution No. 113 (Seventy-fifth Congress); *Monograph No. 28: Study of Legal Reserve Life Insurance Companies* (1940) § II; and *Appendix A*. (This will hereafter be referred to as *Monograph 28*.)

3. The "problem" has received scant discussion. See Note, *Conflict of laws as regards rights of creditors in respect of proceeds of life insurance* (1932) 79 A. L. R. 809, 812. The text writers have not considered the problem at all; the law reviews have ignored it; the American Law Institute has merely restated the law of "conflicts"—naturally no institutional discussion or analysis was involved. In mitigation it may be stated that the problem is new; the cases are sparsely distributed. This paper is written with a bias for the creditor, against exemptions. It is not intended as a dissertation upon conflict of laws.

4. HUDNUT, *SEMI-CENTENNIAL HISTORY OF THE NEW YORK LIFE INSURANCE COMPANY* (1895) 8.

5. N. Y. Laws 1840, c. 80; DOMESTIC RELATIONS LAW § 52.

on a human craving: security, not for oneself, but for others. A husband or father, anxious to protect his dearly beloved, is willing to tax himself annually (pay a premium) in return for a promise by someone (the insurance company) to pay a designated sum of money to a named individual after the father's (or husband's) death. The insurer can make such a promise with safety if enough husbands and fathers have a similar craving and will similarly tax themselves. And such has been the case. The burgeoning of the insurance business is the direct result of the human craving for security.⁶ In this regard, insurance is gambling made safe and blessed with all the trappings of orthodoxy.

The second phase in the development of our problem (the order was not dictated at Sinai; the phases merge and overlap) runs with the pattern of the history books: it is a minor blue print of the growth and development of the United States since 1850. First the small business, then the larger ones, and finally the huge monopoly-capital combines illustrated by the few companies which dominate the field.⁷ Today, the business is, geographically, spread over the entire continental area of the nation.

The machine shops of the country may seem a bizarre factor at this stage of the problem. But written large as one of the aggravating factors involved is the migratory habit of Americans. And this depends directly on the technological advances in transportation effected since 1850. It is important to bear in mind the time-schedules of travel of the decades since the middle of the last century. These have contracted in time and expanded in space with the cheapness and speed in covering distance.

These are the dynamic phases of the problem. The static structural framework is provided by the forty-eight states, each with its separate code regulating the insurance business, and its special exemption acts. A legal "Balkans" is superimposed, without functional reason, on a business that is continental and deriving its support from citizens blithely insuring their lives in New York, or Pennsylvania, or elsewhere, and moving to another state, perhaps Florida, or Ohio.

6. The insurance companies are not unaware of the power of the death's-head in the selling of policies: See, e. g., *Monograph No. 28*, § XV, *passim*.

7. *Monograph No. 28*, 8. There is no viewing-with-alarm intended in the use of the words "monopoly-capital". It is merely a phrase designed to capture in print the huge concentrations of money and property in the confines of a few managements which control the field. Obviously, since the business depends on sharing the risk amongst great numbers, it is far better that the concentrations be large. Whether or not such a result is good or bad is not *per se* an economic question; it is more of a political and religious matter and the answer thereto depends on one's faith. Likewise (parenthetically), is the matter involved in whether or not respective managements have had a social conscience measuring up to the size of the empires they rule. For our purposes it is sufficient to notice, in this phase, the huge realm which the institution controls. *Monograph No. 28*, *passim*.

We have indicated, in bare outline, the background of the particular problem. Its immediate incidence is caused by *X* insuring his life in State *A* for the benefit of his wife *Y* (or any other third person), with insurance company *M* which may or may not have its principal office in State *A*, and then removing to State *B*, State *C*, and ultimately dying in State *D*. In all these states the laws as to the rights of *X*, *Y* and the creditors of *X* and *Y* with respect to the insurance contract and its proceeds are not congruous. Accordingly, it becomes important to decide what laws "govern". Controversy occurs because the laws of State *A*, if applied, would favor *X* (or the creditor) while the laws of State *D* (or *B*, or *C*) would favor the creditor (or *X*, or *Y*).

By hypothesis, it should be an easy matter for the court before whom the controversy is argued to reach a just and proper decision. In similar cases where conflicting sets of laws may be applied the decision as to the selection of the correct law is decided by the principles of conflict of laws. In the problem with which we are concerned there are various principles which it is necessary to grasp thoroughly before a proper comprehension can be had. But it should be noted that there are no special conceptions which are presumed to be peculiarly appropriate to our particular problem.⁸ The legal ideology which can be brought to play on any conflicts issue arising out of an insurance contract is derived from the general body of conflicts law. The rules involved are stated in terms of "substance" and "procedure": the *lex loci* governs substance,⁹ the *lex fori* determines procedure.¹⁰ An exemption act is a matter of procedure, hence the *lex fori* governs.¹¹ But one

8. Consider, e. g., the absence of any special consideration to Insurance as a subject matter in the field of conflicts in the RESTATEMENT, CONFLICT OF LAWS (1934); the only sections dealing especially with this matter are 317-319 (Place of Contracting).

9. GOODRICH, CONFLICT OF LAWS (1st ed. 1927) 157-187; cf. Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 YALE L. J. 333.

10. RESTATEMENT, CONFLICT OF LAWS (1934) Ch. 12.

11. See, e. g., RESTATEMENT, CONFLICT OF LAWS (1934) § 600: "The Law of the forum determines matters pertaining to the execution of a judgment, and what property of a judgment defendant within the state is exempt from execution and on what property within the state execution can be levied, and the priorities among competing execution creditors." The result achieved in *First Nat. Bank v. Burch*, 80 Mich. 242, 45 N. W. 93 (1890) is in accord with this rule. There the defendant was entitled to fraternal benefit insurance moneys on a certificate. The action was brought in Michigan where the Society was garnished. Under Indiana law the fund was exempt from defendant's creditors. No such statute obtained in Michigan. It was held that the Indiana law had no extraterritorial force, hence the creditor recovered. This, it should be noted, does not, in *haec verba*, go on the exemption-*lex-fori* ground. Similarly in *Hamilton v. Darley*, 266 Ill. 542, 107 N. E. 798 (1915), *X* insured his life for the benefit of *Y* in Illinois. The insurer was an Iowa company. No exemption obtained in Illinois; an exemption in *Y*'s favor did exist under Iowa law. It was held that the fund was not exempt in Illinois from *Y*'s creditors, because Illinois law "governed" the "contract"—it being found to be an "Illinois" contract. *Sed quare*: Suppose it were an "Iowa contract", result—what?

In regard to this problem compare the discussion *infra* on the *McRee, Andress* and *Annis* cases (pp. 38, 39, 43). A precise holding that the *lex-fori* "governs" in such instances is found in *Foley v. Foley*, 99 N. J. L. J. 1432 (March 24, 1938, Sup. Ct., Shientag, J.) (the judgment-debtor was a resident of Pennsylvania, the policies were

must not forget, in reviewing basic principles, those endemic to the federal system. No state can legislate to affect contracts made beyond its borders.¹² Hence the local exemption act can not apply to contracts so made.¹³

Within the limitations of the conceptions of conflict of laws the present problems must be resolved. However, since "substance", "procedure" and their conflicts relatives are polar terms, resolving nothing, it is clear that much controversy will become grist for the judicial mill. Obviously, the broad, general principles now obtaining will become sharpened and refined to cope with the new type of problem. Yet it seems likely that the problem itself will never be solved. While complete certainty as to the *rules* will then, as now, exist, some doubt will always persist as to their application. Within such limits the courts should have room to retain their freedom of decision in each case and yet not violate the compulsions of *stare decisis*.

It is not the function of this paper to inveigh against this condition. Similar sources of controversy have existed since the founding of the Union. True, lawyers of pragmatic inclination might insist that the problems could be resolved by "uniformity"—achieved, either under uniform federal statute, uniform state legislation, or outright federal ownership of the economic institution itself. The present climate of legal opinion, however, deems federal legislation or ownership impossible; at least without a special alteration of the federal compact, either judicially or by amendment. Such activity, lying in the realm of prophecy, is beyond the scope of this paper. Uniform state legislation, likewise, appears to be, for practical purposes, a matter for the remote future. Thus the present source of controversy seems fated to last for quite some time. It will recreate itself in an endless succession of

Pennsylvania "contracts". On execution process, it was held that New York law governed: "The applicability of laws exempting insurance policies is not governed by Pennsylvania, but by New York Law. . . ." In *Foley v. Equitable Life Assn. Soc. of U. S.*, 173 Misc. 1031, 19 N. Y. S. (2d) 502 (Sup. Ct. 1940), an assignee of a receiver appointed in supplementary proceedings of X, a judgment-debtor, sued the insurer to recover the cash value of 24 annuities issued to X. *Defense*: that they were issued to X while a Pennsylvania resident, were delivered there, and first premiums paid there; that a Pennsylvania statute exempted such annuities from reach of X's creditors. *Held*, on plaintiff's motion to strike out, *granted*; ". . . the weight of authority in this country clearly holds that the exemption laws are local in their nature and have no extra-territorial force or operation. They are not part of the contract, are related to the remedy, and subject to the law of the forum. . . ." The defendant relied on the *Ruggles* case, p. 49 *infra*. But "this case simply held that the New York Statute . . . 'has no extraterritorial effect' . . . It did not hold nor even intimate that the laws of Ohio, if fettered by a statutory restriction of exemption, would be enforced in the State of New York; it is not controlling here. . . ." *Id.* at 1033-4, 19 N. Y. S. (2d) at 504-5.

12. *Hartford Accident and Indemnity Co. v. Delta and Pine Land Co.*, 292 U. S. 143 (1934); *Allgeyer v. Louisiana*, 165 U. S. 578 (1897); *cf. Broderick v. Rosner*, 294 U. S. 629 (1935).

13. *United States Mortgage & Trust Co. v. Ruggles*, 258 N. Y. 32, 179 N. E. 250 (1932). As to the exact implications of this doctrine, see p. 49 *infra, et seq.*

slightly variant, though generally similar litigations which should provide a fertile field for research. To some examples of judicial treatment of the problem we now turn.

I. SOME ILLUSTRATIONS OF THE GENERAL PROBLEM

The first problem presented for judicial construction turned on the validity of a married woman's assignment of her interest as beneficiary of an insurance contract. The source of dispute here was the decision by the New York court in the entirely domestic quarrel contained in *Eadie v. Slimmon*.¹⁴ It was there held that the intent which pervaded the Verplanck statute forbade such an assignment. This conclusion was derived by the court from its conception of the insurance contract as a special provision for widowhood. To implement that view it decided that its purpose could best be served by preventing married women from "trafficking" in their policies.

On this mental crag, however, the New York court could find no company.¹⁵ With such general judicial disapproval of the rule it is not difficult to guess that other courts found it easy to avoid its application. Of course, the basic minimum upon which the rule could be invoked in a jurisdiction other than New York required that the insuring company, at least, be "domiciled" in New York. But if the policy were "delivered" in Illinois then it could be held to be an Illinois contract.¹⁶ And even if the policy were assigned in New York, the assignment could be held to be governed by the laws of the state where it was delivered.¹⁷ Of course, this worked as well in reverse, where in a special case the local court wanted to apply the rule.¹⁸ The cases are not any longer of practical moment—assignability of policies has long since become established in all jurisdictions. But they are illustrative of the availability of doctrine in this field.

14. 26 N. Y. 9 (1862).

15. *De Ronge v. Elliott*, 23 N. J. Eq. 486 (1873) reviews some of the decisions in jurisdictions other than New York. All the following cases refused to follow (or apply) the rule of *Eadie v. Slimmon*: *Norwood v. Guerdon*, 60 Ill. 253 (1871); *Ford v. Ins. Co.*, 6 Mackey 384 (D. C. 1888); *Emerick v. Coakley*, 35 Md. 188 (1872); *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41 (1900); *Archibald v. Ins. Co.*, 38 Wis. 542 (1875); *Canterbury v. Northwestern Mutual Life Ins. Co.*, 124 Wis. 169, 102 N. W. 1096 (1905); *Baker v. Young*, 47 Mo. 453 (1871). It is interesting to note, however, the statement of counsel in *Conn. Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305 (1867), that the rule of the *Eadie* case was "universally accepted" by insurance companies as the true construction. This is an interesting sidelight, if true, on an early institutional attempt to create a favorable law, i. e., one which would aid in the sale of policies. The result in the *Eadie* case could, of course, be based upon a statute forbidding married women to act as sureties for their husbands. Cf. *Stokell v. Kimball*, 59 N. H. 13 (1879).

16. *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398 (1866).

17. *Conn. Mutual Life Ins. Co. v. Westervelt*, 52 Conn. 586 (1879). The law of the place where the assignment was executed and delivered may not have any bearing: cf. *Northwestern Mutual Life Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108 (1914).

18. *Pratt v. Insurance Co.*, 3 Shan. 174 (Tenn. 1875). Collaterally, on this point, compare three decisions by the same court: *Baker v. Young*, 47 Mo. 453 (1871);

An interesting example of the judicial use of conflict of laws concepts is reflected in *Equitable Life Insurance Society v. McRee*.¹⁹ There X, a resident of Alabama, insured his life with a New York company for the benefit of his wife and son. Then he moved to Georgia, and there changed the beneficiary to his estate. Thereafter he moved to Florida, where he died domiciled. The policy still designated his estate as beneficiary. The Florida act provided that:

"Whenever any person shall die in this State leaving insurance on his life, the said insurance shall inure exclusively to the benefit of the child or children and husband or wife of such person in equal portions, or to any person or persons for whose use and benefit such insurance is declared in the policy; and the proceeds thereof shall in no case be liable to attachment, garnishment or any legal process in favor of any creditor or creditors of the person whose life is so insured. . . ." ²⁰

The insurance company paid the proceeds to the administratrix of X's estate. X's son, relying on the statute, sued the company for one-half of the fund. The company defended on the ground that it properly paid the administratrix under (a) the law of Alabama, where the contract was "made", (b) the law of New York, where the policy was payable, and (c) the law of Georgia, where the change of beneficiary was effected. A judgment for the plaintiff, rendered on demurrer, was reversed. The court's justification was to the effect that the Florida statute could not affect the rights of the insurer under a contract made in another state, since it had no extraterritorial force; that where insurance contracts are made outside of Florida, and without reference to Florida law, then neither the law nor the policy of the state forbade payment to an administrator of the insured even though the latter died domiciled in Florida.

A re-reading of the Florida statute will disclose that it is grammatically bifurcated. It specifies that all policies payable to an insured's estate shall be deemed to designate the spouse and children of the insured as beneficiaries as though actually named therein; and, further, that the proceeds shall not be liable for the debts of the insured. What is this statute, exemption or regulation? Certainly it is exemption insofar as it denies creditors access to the funds. But if the provision

Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419 (1871); and Seifert v. Jones, 84 Mo. 591 (1884). In the *Brant* case the court accepted the *Eadie* rule, but made it depend on statute; in the *Baker* case it repudiated the rule; and in the last decision (by dictum?) it reasserted the rule—in a situation where its sympathies were obviously with the widow.

19. 75 Fla. 257, 78 So. 22 (1918).

20. 3 FLA. COMP. LAWS ANN. (1927) § 7065. In bankruptcy this statute is held to be one of exemption: *Cooper v. Taylor*, 54 F. (2d) 1055 (C. C. A. 5th, 1932).

"regulates" the insurance business by specifying the class and status of beneficiaries, is it exemption? In this aspect the statute can be viewed as merely doing what the insured could do, naming beneficiaries. So regarded, it might be stated that the policy could not be reached by the insured's creditors since it is not payable to his estate but to beneficiaries named by statute. This, however, does not follow from the statute: that compulsion depends on judicial construction.²¹ Valid basis exists for the contention that a policy on X's life payable to named beneficiaries is an asset of X's estate and can be reached by creditors if X retains dominion and control.²² From this point of view the statute can be considered to be wholly one of exemption,²³ imbued with the entire purpose of excluding creditors, and designed to achieve that purpose most fully by providing that the funds go to the insured's immediate family, the only ones who would get the funds apart from creditors.

Here, then, we note an interplay of concepts which reveals the inadequacy of conflicts principles in this field. The plaintiff was denied recovery because the statute was not exemption, but regulation. It designated beneficiaries and clearly could not operate extraterritorially on an Alabama, or Georgia, or New York contract. Yet that the statute was one of exemption seems inescapable. *Quære*: what would have been the decision in Georgia²⁴ if the contract had been made in Florida?

In *Estate of Andress*²⁵ a Massachusetts company issued a policy on the life of an Ohio resident payable on his death to his personal representatives for the benefit of his "heirs". The insurance was written on the mutual assessment plan. The Ohio statutes²⁶ at that time expressly provided that the exemptions granted in the case of ordinary life insurance should not apply to policies written by foreign mutual assessment companies. In Ohio probate proceedings, creditors of the deceased insured sought to reach the funds as against the insured's heirs. The court denied their right to do so. It reasoned that since the Ohio statute expressly excepted such a policy from the scope of the local exemption act the Massachusetts law governed. The inference, of course, could be that no exemption act applied. Apart from that, the result is to have a foreign exemption statute govern in Ohio.

This, of course, completely disrupts the *lex fori* doctrine, since exemptions are always procedural and thus deemed to be the authority

21. See Cohen, *The Fraudulent Transfer of Life Insurance Policies* (1940) 88 U. OF PA. L. REV. 771, 786, *et seq.*

22. See Cohen, *Execution Process and Life Insurance* (1939) 39 COL. L. REV. 139, *et seq.*

23. Compare *Pace v. Pace*, 19 Fla. 438 (1882) with *Matter of Vaughn*, 2 F. Supp. 385 (D. C. Fla. 1932).

24. That is, if X died in Georgia with the policy payable to his estate, leaving children.

25. 6 Ohio Dec. 174 (C. P. 1897).

26. REV. STATS. OHIO § 3630 E.

to look to under this hypothesis. And, with this result in mind, is it far fetched to suppose that the query posed in connection with the *McRee* case might be answered in heterodox fashion?²⁷ It is noteworthy that the Supreme Court of the United States has said, on this point, that:

"The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein. . . ." ²⁸

Ergo, to the "regulation" versus "exemption" concept hatched in the *McRee* case, add the idea of incorporation by reference into insurance contracts, of the insurer's domiciliary exemptions.²⁹ Such contradictory conceptions give little comfort to the searchers for certainty in the law, but they should be a fruitful source of litigation.

In connection with the traveling exemption act it is well to bear in mind the auxiliary problem created by unlimited exemption. The abstract justification for exemptions is the protection of local residents from penury; they are a sort of "equitable" grace to protect against the harshness of "legal" execution. If *X* has \$500 in the bank as the

27. Assume that in Georgia a policy payable to the insured's estate is, all other considerations aside, subject to the claims of creditors. *X* insures his life in Florida, while a Florida resident, and then removes to Georgia. He has a spouse and children alive. Can a Georgia creditor reach the policy, or does the Florida statute govern? And, if the Florida statute is held to "govern" (or becomes part of the "contract", or is "substance", or what have you), assume that *X* has lived in Georgia for a year and then goes into bankruptcy. Can his trustee reach the policy? The Bankruptcy Act provides that the "exemption" act where the insured-bankrupt has resided for the last six months governs. (BANKRUPTCY ACT § 6). What then? Apparently the Georgia act governs, but since the Florida act is part of the "contract" ("Right", etc.), then the policy (The Florida Act) must be considered as the subject matter on which the Georgia statute operates. That heterodoxy may be orthodox in this field, consider *Craven v. Roberts*, 60 Pa. Super. 140 (1914). There a Maryland fraternal benefit society issued a policy on the life of a Pennsylvania resident. Under Maryland law the proceeds were exempt from creditors of the beneficiary. No such exemption was stated by the court to obtain under the *lex fori*. Yet the funds were held exempt from creditors in Pennsylvania on the ground that the Maryland exemption controlled. Since the decision was also rested on *Ogle v. Barron*, 247 Pa. 19, 92 Atl. 1071 (1915), it may not be a precise holding. In the *Ogle* case, identical facts were involved, but garnishment in Pennsylvania was refused on the asserted ground that the benefit was payable only on the return of the certificate "properly endorsed". This was held to mean endorsement by the beneficiary, which had not been obtained. (Cf. Cohen, *The Attachment of Life Insurance Policies* (1941) 26 CORN. L. Q. 213, 232.) However that may weaken the force of the *Craven* holding, the latter certainly gives no comfort to the exemption-*lex-fori* idea, and, if anything, is in line with the *Andress* and *Annis* cases (pp. 39 *supra*, and 43 *infra*).

28. *Central Bank of Washington v. Hume*, 128 U. S. 195, 207 (1888). But cf. the orthodox decision in *Sanders v. Armour Fertilizer Works*, 292 U. S. 190 (1934); the Circuit Court of Appeals decision is noted in (1934) 28 ILL. L. REV. 821.

29. Under the circumstances this is an obvious intellectual hypocrisy. By hypothesis, exemptions are governed by the *lex-fori*. If a court wants to disregard this rule, and still give it lip service, it merely finds that the exemption has entered into the "right", ergo is a matter of "substance" and therefore must be governed by the *lex-loci*. See, e. g., *State ex rel. Fulton v. Heinrich*, 48 Ohio App. 455, 194 N. E. 395 (1934), noted with disapproval (1935) 21 VA. L. REV. 951; *John H. Schroeder Wine & Liquor Co. v. Willis Coal & M. Co.*, 179 Mo. App. 93, 161 S. W. 352 (1913). See Note, *The Extraterritorial Effect of Exemption Laws* (1914) 12 MICH. L. REV. 487.

sole bulwark against destitution there is nothing in the common law which would prevent his creditor from taking it all to apply on a judgment of the same (or greater) amount. Exemption acts, saving to the debtor a fixed sum (say \$500 or \$1,000) supply the mercy, otherwise non-existent in execution. But careful attention should be paid to the fact that Iowa is concerned only with the well-being of Iowa residents, and not with that of residents of New York. Accordingly, local exemption statutes should favor only local residents. The statutes, however, generally contain no limitations so restricting their scope.³⁰

This would not be of any great moment were it not for the fact that Americans pay no attention to such matters when they move about. There are various states, for example, which exempt insurance funds in the hands of a beneficiary from the claims of her (or his) creditors. Iowa is such a state. Assume that X insured his life for the benefit of Y, his wife, both residents of a state where the funds in Y's hands may be reached by her creditors. Y removes to Iowa. Will the Iowa exemption apply to her? The Iowa court in *Stark v. Stark*³¹ held it did, on the ground that the statute was limitless in extent of persons covered (i. e., no distinction between residents and non-residents).³²

If the beneficiary actually removes to Iowa there can be little effective objection³³ to the result. Objection does exist, however, since it

30. See Notes: *Right of non-resident to claim exemption from execution* (1908) 10 ANN. CAS. 500-502; (1915) *Right of non-resident debtor to benefit of local exemption law*, L. R. A. 1915A, 396, 397: "On the ground that exemption laws are enacted for a purpose that is humanitarian in the broadest sense, the weight of authority is in favor of that construction which includes non-residents of the state among the beneficiaries, unless the statute in plain terms or by necessary implication excludes them." There are some well-reasoned cases which support the thesis here advanced, namely, that local laws should apply only to local persons. See, e. g., *Woolfson v. Mead*, 96 Neb. 527, 148 N. W. 153 (1914); *Kelson v. Detroit, G. H. & M. Ry.*, 146 Mich. 563, 109 N. W. 1057 (1906); *Kyle v. Montgomery*, 73 Ga. 337 (1884). The note writer above quoted has classified these decisions as in the "minority". Overlooking his arithmetic for the moment, and forgetting the slur of the characterization, it might be well to ponder a good statement of their rationale:

"States are not accustomed to give exemptions from the laws for the collection of debts for the benefit of persons residing in other jurisdictions. The exemptions are personal privileges, . . . ; and if one who possesses them removes to a foreign state, whereby he would acquire under its laws privileges more or less liberal not possessed by our own people, he thereby abandons those which he possessed before so far as they were local in their nature. And if exemption privileges are not necessarily local, they certainly are in their reasons. The are conferred on grounds of state policy, to add to the comfort and encourage the industry of the people; and every state will make such regulations on the subject as its own people shall deem wisest and best." Cooley, J., in *McHugh v. Curtis*, 48 Mich. 262, 263, 12 N. W. 163 (1882).

31. 203 Iowa 1261, 213 N. W. 235 (1927), 13 IOWA L. REV. 104, 105.

32. The note writer in (1927) 13 IOWA L. REV. 104, 105, approved of the decision because it was so nice and "liberal"; because Iowa had always been "liberal" in construction of such statutes; and "To deny a non-resident debtor the benefit of the statute considered in the case at hand would necessitate a departure from the policy of liberal construction and the adoption of a restrictive construction apparently contrary to the intention of the legislature as expressed in the statute. The court cannot limit such a statute by construction."

33. The over-all objection has already been stated, i. e., that the Iowa act should not apply to non-residents. But once the beneficiary has become a resident of Iowa,

seems to afford some opportunity for *Y*'s bilking creditors in New York, for example, by removing to a debtor's paradise. The evil becomes more pronounced if the principle is generally adopted so as to apply even without residence in fact. Obviously if a debtor has property in several states and he is permitted to claim the local exemption in each, creditors will be seriously harmed.³⁴ It is equally true that if beneficiaries, living elsewhere, merely deposit funds in Iowa and are permitted to hold them free from the claims of creditors, a most unhappy situation will prevail.

Paralleling the *Stark* decision and emphasizing the reality of the problem involved, is the decision in *First National Bank v. Schneider*.³⁵ There *X* insured his life in a fraternal benefit policy which designated his wife *Y* as beneficiary. On *X*'s death the proceeds became due and payable to *Y*, but before payment the insuring society was garnisheed in an action started in Minnesota by a Minnesota creditor of *Y*. *Y* was a non-resident. Minnesota had the usual fraternal benefit insurance exemption act under which *Y* could take the funds exempt from her creditors. The plaintiff in the suit tried to avoid the application of this act because of *Y*'s non-residence.

The court, however, immersing itself in the "sweeping language of the statute," refused to see, or failed to realize, the grave matters of state policy involved and permitted the non-resident beneficiary to walk off with the proceeds.

If one recalls the tremendous size of the institution with which we are concerned and remembers that all the states have some version of the "ordinary" Verplanck exemption in favor of the beneficiary from the insured's creditors, that others have the full-blooded exemption in favor of the beneficiary (and even the insured) from her creditors, and that most have the extraordinary fraternal exemption, it becomes apparent that tremendous inroads have been made into a type of private property, creditors' property.

One of the real difficulties is that creditors are penalized or benefited haphazardly without equality. And, basically, that is a funda-

its exemption laws should apply, unless it can be shown that she removed there intending to avoid the exemption laws of her previous domicile. Even so, granted the Iowa premise, how could she be penalized? This assumes that mere removal to Iowa will be accepted as proof of the requisite malicious intent. Of course, if the *McRee* situation could be worked in reverse, there might be some ironic justice for creditors. But imagine any court holding that liability of insurance funds to execution in State *A* (the state of the "contract") becomes part of the "Right" on removal to State *B*!

34. *Vide* the remarks of Letton, J., in *Woolfson v. Meade*, 96 Neb. 528, 531, 148 N. W. 153, 154 (1914): "If defendant's contention is sound, a fraudulent debtor doing business in this state and owning a valuable homestead in an adjoining state [might be entitled to get the benefit of Nebraskan Exemption Acts]. . . . It is unreasonable to believe that the Legislature intended to give a nonresident debtor privileges which it denies to the residents of this state."

35. 179 Minn. 255, 228 N. W. 919 (1930).

mental flaw in the present conflict of laws concepts. The matter involved in the *Stark* and *Schneider* controversies should be kept in mind when assessing the general effectiveness of the law being currently applied.

In *Estate of Andress* we dealt with the exemption act that travelled. In the *Stark* and *Schneider* cases we ran across the debtor who travelled to meet the hospitable exemption. In *Matter of Annis v. Pilkewitz*³⁶ we find that those decisions are not anomalies; the results there may be carried to an even further extreme. As a matter of background, it would be well to refer to Section 15 of the New York Personal Property Law.³⁷ It is there provided that if *X* insures his life for the benefit of *Y*, he may specify that the proceeds are to be paid to *Y* in periodic installments.³⁸ These payments, if *X* so specifies, are exempt from the reach of *Y*'s creditors.³⁹ And the New York courts have not hesitated to interpret the statute with a fine fervor for the debtor, *Y*.⁴⁰

But what is the result in another state where there is no Section 15, and where *Y* (the beneficiary of such an arrangement made in New York and stated by contract to be "governed" by New York law) is residing and receiving the payments? Is she entitled to hold them

36. 287 Mich. 68, 282 N. W. 905 (1938). This important case (it is important in the fields of insurance and creditors' rights as well as conflicts) was passed by in the law reviews.

37. That part of the statute pertinent here was enacted by the New York Legislature in 1911. See Laws of N. Y. 1911, Ch. 327.

38. The relevant portion is as follows:

"Provided, however, that when the proceeds of a life insurance policy, becoming a claim by death of the insured, are left with the insurance company under a trust or other agreement, the benefits accruing thereunder after the death of the insured shall not be transferable, nor subject to commutation or incumbrance, nor to legal process except in an action to recover for necessities, if the parties to the trust or other agreement so agree." NEW YORK PERSONAL PROPERTY LAW § 15.

39. The pre-natal history of this act may not be out of place in assessing the position of the creditor. Remember that "the creditor" is a collective word which represents in fact millions of people who have not acted in concert. Concerted action to obtain favorable legislation is easy to an institution—especially that of life insurance (*Vide Monograph No. 28, §XVII, passim*). At any rate, the New York Life insured the life of one Baumer. On his death, in accordance with the terms of the policy, it agreed to make periodic payments to his widow. She assigned her rights thereunder to one Black, who, when the company refused to pay, sued it and recovered from it. *Black v. New York Life Ins. Co.*, 126 N. Y. Supp. 334 (Sup. Ct. 1910). Thereafter the statute was amended. As to this the Superintendent of Insurance stated (53d Report, Part I, Vol. 16 (1912); Assembly Doc. No. 30, 135th Session, p. 83):

"[The bill] was brought forward by the New York Life Insurance Company and was intended to protect dependent widows and orphans against the wiles of the promoter and conscienceless borrowing by practically making insurance policy trust funds of this character immune from legal process. The bill during its passage was considerably amended at the instance of representatives of the retail merchants [enter the necessities], but both in its original and in its amended form had the hearty approval of the department."

40. See Cohen, *Execution Process and Life Insurance* (1939) 39 COL. L. REV. 139, 159-161.

exempt as against her local creditors? ⁴¹ In the *Annis* case the Michigan court answered this question affirmatively; and to the objection of the plaintiff's attorney that it was permitting a New York exemption act to operate in Michigan, it replied that counsel had failed to distinguish "between a litigant's rights arising from statutory provisions for exemptions, and the contractual rights of such a party. In the instant case we are not concerned with statutory exemptions, except that the New York statute provides for such a contract as exists between [the insurance company and Y]. The sole question is one of contractual rights." ⁴²

This, apparently, was to anticipate any intellectual argument, as argument merely, over the *lex fori* doctrine; after all, procedure is, procedure, but substance is another thing. The court, however, went further: it said that to refuse to give effect to the New York statute would violate the full faith and credit clause. It did not cite a single precedent in point.

In view of the amount of the insurance business controlled by the New York group, it is clear that the effect upon creditors will be drastic if *Annis v. Pilkewitz* becomes hallowed doctrine.

41. See GRISWOLD, SPENDTHRIFT TRUSTS (1st ed. 1936) § 113: "Among the many difficult problems which may arise in connection with statutes of the type here considered, perhaps the most serious are in the field of the conflict of laws. Where the beneficiary undertakes to assign his interest or his creditors seek to reach it, it may develop that the state of the domicile of the insurance company has a statute of the type here discussed, while the state of the domicile of the beneficiary has no such statute. Many bases for the application of such a statute in addition to the domicile of the insurance company or the beneficiary might be suggested, as, for instance, the state of the domicile of the insured, the place where the contract was made, the place where the policy was delivered, the place where the policy obligation is to be performed according to its terms, the place whose law is specified in the policy, or, treating the question as procedural, the forum.

"These questions cannot, of course, be answered in the abstract. The solution depends in considerable part upon the exact language of the statute used. Some of the statutes are applicable only to 'domestic' insurance companies; others include all companies authorized to do business in the state; other statutes relate to 'policies delivered within this state'; still others take the form of exemption laws and would seem to be clearly procedural. The terms of the statute in these respects may be a considerable aid in solving the conflict of laws problem; but they may not be conclusive, especially where the question arises in a jurisdiction other than that whose statute is invoked.

"Where the terms of the statute leave the question of its applicability open there would seem to be considerable basis for contending that the controlling statute should be that of the place where the insurance company's obligation is to be performed. This place seems to be most closely analogous to the place of the administration of the trust, whose law governs the alienability of the interest of the beneficiary of a true trust of personal property. . . . In the case of a trust it is ordinarily not difficult to find the place where it is administered. It is not so clear, however, what the place of performance of the insurance company's obligation is. It may be the home office . . . or it may be a general agency elsewhere, or the place of domicile of the beneficiary. Where the policy is clear as to the place of performance its provisions should govern. Where the terms of the policy are not clear it seems very difficult to choose between the law of the domicile of the insurance company, and the law of the domicile of the beneficiary, if such choice must be made. In the absence of decisions, a more definite statement would appear to be unduly hazardous." Professor Beale does not discuss the problem here raised. See 2 BEALE, THE CONFLICT OF LAWS (1935) § 346.4.

42. 287 Mich. 68, 76, 282 N. W. 905, 907 (1938).

II. FRAUDULENT TRANSFERS

A. *As to the Entire Policy*

The typical transfer problem involves an insurance company organized under the laws of State *A*, and *X*, an insured debtor who is a resident in State *B*. If *X* carries a policy payable to his estate, and "transfers" the policy to *Y*, which law will govern so as to test the validity of the transfer with respect to the rights of *X*'s creditors? To understand the problem it is well to bear in mind what occurs when *X* makes the transfer. The policy, for our purposes, represents property, and whether it be further broken down into "contract", "debt" or other category makes little difference. For the purpose of conflict of laws it is personalty as distinguished from realty—a sufficient conceptualization.

The policy represents in its cash value feature present money's worth; in its entirety it is a unilateral contract by the company to pay on *X*'s death (assuming that it is a straight life policy) if all conditions are fulfilled. If *X* makes a "transfer" he does this in one of three ways: (1) he assigns to *Y*, (2) he names *Y* as beneficiary, (3) he makes a "gift" of the policy to *Y*.

In reference to the operative facts, the transfer does not involve the company except as a passive recipient of *X*'s acts; i. e., whether *X* assigns, changes the beneficiary, or makes a gift to *Y*, the company is involved only to the extent that notification is given it and its "records" are changed.

Accordingly, it would seem that the validity of *X*'s acts should be judged by the law of the jurisdiction in which they took place.⁴³ So if *X* makes a transfer in State *B*, whether by assignment, change of beneficiary,⁴⁴ or gift, it is or is not a fraudulent transfer as to his creditors depending on the law of *B*. Certainly there could be no dispute as to this if the creditors themselves were domiciled in *B*.⁴⁵ But

43. *Lee v. Abdy*, 17 Q. B. D. 309 (1886); *National Trust Co. v. Hughes*, 14 Manitoba Rep. 41 (1902); see *Prentice v. Steele*, 5 Montreal L. Rep. 294 (Super. Ct. 1889); *Toronto General Trusts Co. v. Sewell*, 17 Ont. Rep. 442 (1889); see, on the general subject, Note (1937) *Conflict of laws as regards validity of fraudulent and preferential transfers and assignments*, 111 A. L. R. 787.

44. The problem here discussed, involving rights of creditors as affected by conflicts conceptions, should be distinguished from the problem arising when Insurance Company *T*, organized under New York law (for example) insures the life of *X* in State *A* (or Province *D* or Country *C*) for the benefit of *Y*, *X* then changing the beneficiary to *Q*. The laws of New York, State *A* and say, Province *D* or Country *C*, differ as to the validity of the "designation". Which law governs? On this, see *Re Baeder and Canadian Order of Chosen Friends*, 36 Ont. L. R. 30, 28 D. L. R. 424 (1916); *Hewitt v. Hewitt*, 43 D. L. R. 716 (1918); *Bunnell v. Schilling*, 28 Ont. R. 336 (1897); cf. *Crosland v. Wrigley*, 73 L. T. 327 (1895). For our purposes we need not consider the problem arising out of transfer by testamentary document (cf. *Re Richardson Estate*, 49 D. L. R. 59 (1919)) since the American cases (except where statute alters) hold that the beneficiary of a policy takes by contract.

45. The following problem should be carefully distinguished from that discussed in the text. *X* for the express purpose of making the transfer, leaves State *B*, goes

here again the matter of multiple jurisdiction causes difficulty. Assume that by the law of *B* the policy is entirely exempt from creditors' claims. A transfer there would not be void as to *X*'s creditors in *B*. But assume that in State *A* the policy is not exempt from creditors' claims. If *X* has a creditor there, is the transfer good or bad as to him? Assume that the transfer is bad except insofar as a statute of *B* takes the policy out of the reach of creditors; in that event the statute, being one of exemption, has no force in *A*. Ergo, it would seem to follow that the transfer may be good in *B*, but void in *A*. And point is given to this by the fact that creditors in *A* can always enforce their complaint by obtaining jurisdiction over the company in *A*. A judgment in *A* as to the company would be jurisdictionally sufficient to foreclose *X* in *B*,⁴⁶ no matter how valid the transfer in *B*.

B. *As to Premium Payments*

The original Verplanck act was deemed to be an enabling act for the benefit of women, then suffering from the disabilities of coverture. The group of statutes which immediately succeeded the early legislative version generally provided that the insured could pay out an annual sum for insurance for the benefit of his wife and children. Sometimes the statute, and more often the judicial interpretation thereof, construed this as permitting the insured to pay out the statutory minimum even though he were insolvent. The net effect was to modify the fraudulent transfer statutes. Legislative norms differed, however, as to the amount thus freed from attack. Some statutes permitted \$150, some \$300, some \$500, and others an even larger sum, to be expended annually for the benefit of the wife and children. The current vogue⁴⁷

to State *C* and performs the act there. In *B* the transfer would be void; in *C* the transfer is valid because the policy is exempt. The validity or invalidity of the transfer should not be judged by the laws of *C*; to do that would perfect *X*'s crime. Compare the cases wherein equity will enjoin a resident of State *A* from suing in State *B* for the sole purpose of evading the exemption laws of State *A* (*Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58 (1907); 3 BEALE, *CONFLICTS* (1935) § 600.1; Note (1907) *Injunction against suit in another State to evade local exemption laws*, 15 L. R. A. (N. S.) 1008). The same emotional antipathy to this kind of dealing should react in favor of creditors suing in State *B* to set aside transfers, obviously fraudulent, but made expressly in State *C*, a jurisdiction with a nice protecting statute.

46. Cf. *Chicago, Rock Island and Pacific Ry. v. Sturm*, 174 U. S. 710 (1899). On the recurrent theme of this paper, the multiplicity of conflicts concepts and their magnificent inefficiency to cope with an institution like insurance, consider, in regard to fraudulent transfer, the following: (1) the law of the place where the transfer was made governs; (2) the law of "situs" of the property governs: (a) this is the insured's domicile, or (b) it is the domicile of the company (home office), or (c) it may be the law of any state wherein jurisdiction over the company can be had by a local creditor of the insured debtor.

47. That is the vogue set in 1927 by the enactment of § 55a of the New York Insurance Law, N. Y. LAWS 1927, c. 468, § 55a. Many states have copied the identical pattern. New York has a new model, N. Y. CONS. LAWS (Cahill, 1941 Supp.) A7, § 166, which reserves very little (if anything) to creditors.

is to permit the insured to pay any amount in premiums, reserving to creditors power to attack solely for those "paid in fraud".⁴⁸

In a fairly typical case *X*, a resident of State *A* insures his life with a State *B* company for the benefit of *Y*, his wife. Premiums are paid by *X* in State *A*. Subsequently he removes to State *C* where he dies. The laws of States *A*, *B*, and *C* all purport to specify the rights and liabilities of *X*, *Y*, and their creditors; all are different. Under such circumstances conflicts frequently occur. Which statute applies? Is the statute "substance" or "procedure"?

In *Red River National Bank v. DeBerry*⁴⁹ *X* insured his life for the benefit of *Y* (his wife) in Indian Territory, where they resided. In that jurisdiction there existed a Verplanck statute in the usual form, under the terms of which *X* could pay a certain fixed annual premium even if insolvent. All premiums, above that amount, however, if paid by him, were subject to attack by his creditors. On his death *Y* collected on the policies and came to Texas, where no such statute obtained. In Texas the creditors sought to reach the insurance proceeds. The entire discussion of the court was based on the assumption that the law of Indian Territory applied in determining the rights of the creditors. It should be noted that the problem here was not which exemption law applied. That was, strictly, not the issue. The creditors were complaining of certain payments of premiums made by *X* while insolvent. Those were fraudulent transfers. Obviously the question of whether a fraudulent transfer had been committed, and to what extent, could depend on the law of the place where the wrong had occurred.⁵⁰

In the *DeBerry* situation the law of the forum contained no special legislation of the Verplanck type. The typical situation usually involves the following facts: *X*, a resident of State *A*, insures his life for the benefit of *Y* with a company organized under the laws of State *B*. The company does business in both states. The policy is stated to be payable in *B* and governed by the laws of *B*. It is delivered to *X* in State *A*. *X* pays premiums in State *A* either by delivering the funds to the company's general agent in *A* or by mailing a check to the home

48. See Cohen, *Creditors' Rights to Insurance Proceeds as Determined by Premium Payments* (1940) COL. L. REV. 975, *passim*.

49. 47 Tex. Civ. App. 96, 105 S. W. 998 (1907).

50. In *Jackson v. Tallmadge*, 246 N. Y. 133, 158 N. E. 48 (1927), *X* and *Y* were residents of North Dakota. *Y* was the beneficiary of insurance on *X*'s life. Shortly before *X* died *Y* mailed an assignment of the policy to *B* in New York, together with a letter explaining that she would come to New York to explain the purpose of the transfer. On *X*'s death *Y* came to New York and asked *B* to hold the policy funds in trust for her use and beyond the reach of her creditors. In an action instituted in New York to set aside the conveyance the issue turned on where the transfer was effected. In ruling for the creditors, the court held that the transfer of the policy took place in New York and title did not pass until the "declaration of trust" in New York.

office in *B*. Both states have varying versions of Verplanck's statute, but the rights of creditors are different under both statutes. Which statute applies in an action by creditors of *X* in State *A* to reach the proceeds of the insurance to the extent of premiums paid by *X* in "fraud of creditors"?

In *Lanning v. Parker*⁵¹ the New Jersey court decided that the New Jersey statute governed. Point is given to the controversy by the fact that under New Jersey law (State *A*) all premiums paid in fraud of creditors may be reached out of the proceeds. Under the law of New York, the state of incorporation of the insurer, *X* could pay \$500 annually without regard to his financial condition. Naturally the widow wished to have the New York law apply.

Cursory reflection on the material thus far presented should make it clear that the "problem" presented in the *Lanning* litigation cannot be resolved by employing the various concepts which could be used analogically. Was the New York statute a matter of "substance"? Respectable, if not august, authority is at hand in support of this approach. Incorporation of the New York act into the contract "by reference" would enable a court to produce a logical argument in favor of the widow. If the respective acts were exemptions, however, naturally the law of the forum applied and the creditors got the verdict. Another view⁵² would regard the payment of premiums as fraudulent transfers, to be governed by the law of the state where they occurred. Under this view, if payments were made in New Jersey, its law should determine their status as to creditors. Clearly, our conflicts concepts offer no solace to the student who would by careful "analysis" attempt to gauge the various "issues" and resolve the problem thereby.

Naturally, the New Jersey court did not reason thus in reaching its conclusion that New Jersey law applied. It said that ". . . here the effort is to subject property, created by a debtor of this state in fraud of creditors, to the payment of his debt, which property the fraudulent grantee is permitted to hold by . . . (a) statute of this state, only upon condition that if called upon, she discharge the obligation imposed by that statute. Regarding the act as one operating upon the assets of an insolvent debtor, it becomes an immaterial issue where and under what laws the property was acquired. . . ." ⁵³

51. 84 N. J. Eq. 429, 94 Atl. 64 (1915); accord, *G. P. Farmer Coal & Supply Co. v. Albright*, 90 N. J. Eq. 132, 106 Atl. 545 (1919).

52. See *Red River* case, p. 47 *supra*.

53. 84 N. J. Eq. 429, 436, 94 Atl. 64, 67 (1915). What does this mean if *X* paid all but the last two premiums while a resident of New York, and then moved to New Jersey and paid the final premiums there? Assume that insolvency existed all the time. What would be the measure of relief in New Jersey? In New York?

Similar in inadequate analysis to *Lanning v. Parker* is *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160 (1887). In that case the forum was in Ohio. The insur-

III. UNITED STATES MORTGAGE AND TRUST CO. v. RUGGLES

A tantalizing synthesis of conflict of laws problems was displayed in the opinions of the various New York appellate courts in *United States Mortgage and Trust Co. v. Ruggles*.⁵⁴ There *X*, while a resident of Ohio insured his life with Wisconsin and Connecticut corporations. Four of the policies involved were issued with *X*'s wife, *Y*, as the designated beneficiary. Nine were issued payable to *X*'s estate. *X* and *Y* resided in Ohio from the time the policies were issued in 1920 until 1923 when they removed to and became residents of New York. There *X* died in 1926. *X* paid all the premiums to the general agents of the companies in Ohio, even while he lived in New York. The annual total of these premiums greatly exceeded the sum of \$500.

While *X* was a resident of New York he changed the beneficiary of the policies payable to his estate, to his wife. He did this by mailing the necessary documents to the general agent in Ohio, who forwarded them to the home office in Wisconsin. There the changes were noted by the company and the policies returned to the Ohio agent, who mailed them to *X* in New York. Under Connecticut law, *X* could pay premiums of \$500 annually regardless of his condition; the premiums paid on the Connecticut policy did not exceed that sum. Wisconsin statutes permitted *X* to pay annual premiums of \$150. Premiums in excess of that sum could, if paid in fraud of creditors, be reached by *X*'s creditors out of the proceeds of the policies. The Ohio statute provided that where *X* carried insurance for his wife's benefit, his creditors could reach the proceeds of the policies only to the extent of premiums paid by *X* in fraud of creditors. The then existing New York version of Verplanck's statute permitted *X* to pay annual premiums of \$500 on insurance for his wife's benefit regardless of his financial condition. All insurance *purchased* with premiums exceeding that sum inured to the benefit of his creditors.

X died insolvent. His creditors sued in New York to reach the amount of the proceeds guaranted to them by the New York statute. Their complaint alleged that *X* had been insolvent for a considerable time prior to death. However, no such finding was made by the court and the creditors relied entirely on the provisions of the New York statute. On the first trial⁵⁵ the defendant won. The creditors then

ing company was incorporated under the laws of Pennsylvania. Ohio law gave *X*'s creditors substantial rights in the insurance fund. Pennsylvania law was claimed by the widow to give her the fund exempt from the claims of *X*'s creditors. Ohio law was applied—but on the theory that the Ohio statute was intended to apply to all insurance taken out by Ohio citizens, regardless of the fact that the contract was issued by a "foreign" company; to do otherwise would "work a fraud" on the law.

54. 258 N. Y. 32, 179 N. E. 250 (1932).

55. Special Term dismissed the complaint. The opinion is unreported.

appealed and the Appellate Division reversed,⁵⁶ granting a new trial. The court was divided, three voting reversal, and two for affirmance.

Judge Proskauer, who spoke for the majority of the court, after stating the defendant's contention that application of the New York law would impair the validity of the contracts, without citation of authority, said:

"In my opinion there is no question here whatever of the impairment of the obligation of contract. The contracts were valid in their inception and it must be conceded that the New York statute would have no extraterritorial effect to reach the proceeds of these policies to the extent that they grow out of payments of premiums made before the parties became residents of this state. With respect to the proceeds representing premiums paid after they became residents of the state, however, an entirely different situation exists. At the time of the removal to New York there was no contractual obligation upon Mr. Ruggles to pay the premiums and no contractual right in Mrs. Ruggles to require him to pay the premiums. The payment by Mr. Ruggles of all premiums after he became a resident of the state of New York was made voluntarily and not pursuant to any obligation either to the insurance companies or to Mrs. Ruggles. In the payment of these premiums he disposed of his property at a time when he was a resident of the state of New York. This disposal of his property was subject to the statutory regulations of the New York Law, and the administrator has a right to follow the proceeds of these policies to the extent of the amount of insurance purchased by premiums in excess of \$500 a year after the time when Mr. and Mrs. Ruggles became New York residents. . . ." ⁵⁷

To this the dissenters objected. In their eyes all the contracts were Ohio instruments, and Ohio law applied. They felt that:

"To permit section 52 . . . to operate in the present circumstances would plainly violate section 10 of article I of the Constitution of the United States. It would deprive the . . . beneficiary . . . of her clear contract right (under the Ohio Law) to receive the full proceeds of the policies, free and clear from any claims of her husband's creditors. Such action would impair the obligation of contract. . . ." ⁵⁸

It made no difference to the dissenters that premiums were paid in New York. "These contracts, to which the . . . beneficiary became

56. 224 App. Div. 504, 231 N. Y. Supp. 100 (1st Dep't. 1928).

57. *Id.* at 505, 231 N. Y. Supp. at 101. *Vide* Lanning v. Parker, 84 N. J. Eq. 429, 94 Atl. 64 (1915), cited note 51 *supra*, on this analysis.

58. 224 App. Div. 504, 507, 231 N. Y. Supp. 100, 103 (1st Dep't 1928) The conception which permeates this reasoning is (a) incorporation by reference into the contracts of the Ohio law (*Vide* the *McRee*, *Andress* and *Annis* cases, pp. 38, 39, 43 *supra*) plus (b). The New York statute is merely "regulatory"; hence operation by "New York" law on "Ohio" contracts would be unconstitutional (analogy: the *Delta Pine* case in note 14 *supra*). The available conception in "Exemptions—*lex-fori*" did not interest the dissenters. Why?

a party, were entire, and not contracts from one premium payment time to another. . . . Premium payments made in this state, therefore, must be deemed immaterial on the question involved. . . .”⁵⁹

The case immediately became a subject for comment by the law reviews. But there, too, judgment was sadly divided. One note-writer⁶⁰ used as his springboard the “general rule . . . that an insurance policy constitutes one entire contract for which the first premium is the consideration, and the other payments are merely conditions. . . . The payment of premiums subsequent to the first one did not in any way increase the amount to which the beneficiary was entitled. Therefore, it seems difficult to say that any specific portion of the proceeds of these policies were purchased by the New York premiums. If, however, the insured was insolvent at the time he made any of the payments in New York, creditors might recover back the amount paid from the proceeds in the hands of the beneficiary on the theory of a fraudulent conveyance. . . . But in the absence of a showing of insolvency, the constitutionality of the statute as applied in the principal case seems difficult to sustain. . . .”

Another commentator,⁶¹ however, took a different view. Admitting that the contract of insurance was generally considered “an entire contract” nevertheless that did not “necessarily fix the beneficiary’s right to the whole proceeds; that right becomes fixed only upon payment of the whole consideration agreed upon, i. e., all the premiums that became payable. The premiums paid constitute the fund which is to be traced into the proceeds of the policy and apportioned in the ratio of contributions made to it. . . . And the New York statute attaching only to premiums paid by the insured in New York, would seem not to impair any rights acquired under the Ohio contract.”

A third editor⁶² approved of the result, but on more orthodox grounds. While, he said, “This decision might seem contrary to dictates of comity” still “Comity will not press a state to suicide.” To him “extraterritoriality” was not the issue: if it be argued that the majority was giving “extraterritorial” effect to New York law, the dissenters were just as anxious to give the same effect to Ohio law. No, thought the editor; the real crux of this matter was the payment of premiums in New York. These “acts” were subject to New York law; “The property which formed the subject matter of the payments was property within the state of New York. The transfer and disposition of this property could be regulated by the law of New York.” Thus

59. *Ibid.*

60. (1929) 42 HARV. L. REV. 575.

61. (1929) 38 YALE L. J. 681.

62. Note (1929) 14 CORN. L. Q. 481.

New York law was really not being given "extraterritorial" effect, nor was it unduly interfering with the freedom of contract. "The contract is entirely collateral to the question of creditors' rights. The New York law operates upon the acts of payment by the insured within the state of New York. On this basis, the distinction between the proceeds of premiums paid in Ohio and of premiums paid in New York is a valid one." Nor was it proper, continued the editor, to regard the New York statute as one of exemption. "Upon this basis, the Ohio exemption would be regarded a matter of remedy and therefore subject to the rules of the forum. Such a metaphysical distinction between substantive and remedial law does not seem desirable."⁶³

Disagreeing with this position, a fourth commentator⁶⁴ felt quite pessimistic about the majority opinion. If valid "It invites the possibility of as many 'laws' as there are moves; and in this country moves are many." This would follow from the premise which buttressed the decision. That was the position that each premium payment constituted, in effect, a new contract. From this "it would then logically follow that the new contracts arising out of payments made in New York would be amenable to the New York law, regardless of where the original policy was written. That life insurance policies are contracts from year to year is a rule for which there is a minority authority. The New York court's present application that the annual renewals are to be given effect according to the laws of whatever states the insured may have lived in while paying his premiums is new."

If the premise were not valid, the editor thought the case should be reversed; if valid, it violated the contract and full faith and credit clauses of the federal constitution. This followed directly from four facts: (1) the beneficiary had a vested interest in the policy; (2) the insurance policy was an entire contract; (3) to apply New York law to that contract would impair its validity; and (4) under *Aetna Life Insurance Co. v. Dunken*⁶⁵ failure to apply the Ohio law would violate the full faith and credit clause.⁶⁶

With the same division of authority in the reviews which obtained on the first appeal, the case went back for a new trial. There the trial court, following the lead of the majority opinion in the first appeal, granted judgment to the plaintiff for the proportion of the proceeds determined by the ratio of the amount of premiums over \$500 annually paid in New York to the total premiums paid on the contracts.⁶⁷

63. *Id.* n. 12.

64. (1929) 9 B. U. L. REV. 40.

65. 266 U. S. 389 (1924).

66. On similar reasoning the writer in Note (1929) 6 N. Y. U. L. REV. 304-312 condemned the decision.

67. 137 Misc. 895, 244 N. Y. Supp. 56 (1930).

The defendants again appealed to the Appellate Division. Meanwhile the personnel of the court had been shifted. The result was that four judges voted for reversal, and only one for affirmance.⁶⁸ The presiding Judge, apparently disagreeing with the reasons advanced in both of the opinions for reversal, merely concurred in the result; Judge O'Malley concurred in the reversal for the reasons he had given in his dissenting opinion in the first appeal. Judge Merrell dissented without opinion. Judge Finch and Judge Sherman wrote the opinions for reversal. Judge Finch's ground was that the New York section on which the creditors relied had been "overruled" by a subsequent enactment of the legislature. In this, of course, he was in error, as the Court of Appeals subsequently explained. Judge Sherman disagreed with this, and felt that whether or not the New York statute had been repealed, the creditors' rights had become fixed and could not be interfered with except by violating the constitutional mandate. However, despite this, he felt that reversal was proper because each policy was an Ohio contract, and "at no time subject" to the New York law. "Each policy was an entire contract. . . . Under the laws of Ohio, the . . . beneficiary was entitled to the full proceeds. No enactment by the State of New York could validly impair that contract right. The change, from time to time, of the residence of an insured and the sending of premiums to pay for the insurance from one or another state, in which he might temporarily reside, when each State may have a different statute as to creditors' and widows' rights, surely ought not to affect the amount payable to the beneficiary under the laws of the State in which the contract of insurance was made and where it was to be performed."

The creditors took the case to the Court of Appeals. To Judge Pound, who wrote the opinion for the court,⁶⁹ it appeared that the initial matter of importance was to discover what law governed the contracts. That depended on the "place of contracting", and that was Ohio, "where the policies were delivered to assured." Matters respecting the remedy, of course, were governed by the *lex fori*. But with such matters the court was not concerned.

The crucial point was that the "statute has no extraterritorial effect." It was clear that "The State may not constitutionally regulate or interfere with the acts of foreign corporations outside its limits nor with the liberty of parties to take out contracts of insurance whenever they desire and collect the proceeds thereof." From this "The conclusion follows that the New York statute, in placing a limitation upon the power of insurance companies to write policies payable to the wife,

68. 232 App. Div. 9, 248 N. Y. Supp. 525 (1st Dep't. 1931).

69. 258 N. Y. 32, 179 N. E. 250 (1932).

could reach only business transacted within the State; contracts made within the State." Since the New York statute "applies only to New York contracts, it does not attach to the proceeds of insurance contracts made in States which contain no such limitation on the power of the parties to contract. Payment of premiums in New York does not change the rights of the parties. The policies constitute entire contracts for which the first premium is the consideration and the other payments are merely conditions."

In this welter of conflicting opinion it is difficult to find objective reality in the various dogmas of conflict of laws. All the participants in the drama knew the concepts. Yet the commentators were as divided as the judges. There can be little doubt, then, but that there were many legal conceptions which could have validly applied. The decision depended on which were selected as the operating forces, if they were the matters which really determined the issue. That they could not have such reality ascribed to them follows directly from the diversity of plausibly accurate concepts which could have been invoked. Ultimately, we may guess, the matter which might have decided the case was the weight which the judges desired to give to three (at least) conflicting interests. Was the creditor to be "favored in the conscience of the court" and hence permitted to get the benefit of the New York statute? Was insurance for the bereaved widow to be protected at any cost? Or was the conception of a federal union so strong as to outweigh the creditor's interest? Presumably, it was the political interest which was the most important.

It will be the burden of this discussion to show that the creditor's interest could have been favored without any violation of the federal compact. We start, as we must, with the New York statute. Was it "regulatory"? If so, then its application to "impair" non-local contracts would violate the constitution. But if it were "merely procedural", if it affected only the "remedy", then its application would be proper, for the *lex fori* is always determinative in such an instance. Thus, if the statute was one of "exemption" its application would impair no contract rights. And that the statute, in the sense invoked by the creditors, was one of exemption was the labored result of the New York courts.⁷⁰

Apart from this, however, assume that the form of the New York statute was such as to reserve to creditors the amount of premiums paid by *X* while insolvent. Assume that the law of the "contract" permitted *X* to pay premiums without limit, and regardless of solvency. Would the creditors be deprived of the benefits of the New York act?

70. *Maurice v. Travelers Ins. Co.*, 121 Misc. 427, 201 N. Y. Supp. 369 (1923); *Gershman v. Berliner*, 214 App. Div. 196, 211 N. Y. Supp. 881 (1st Dep't. 1925); see Cohen, *Execution Process and Life Insurance* (1939) 39 Col. L. Rev. 139, 144-146.

The reasoning of Judge Pound might be construed to require such a conclusion. Yet, clearly, it would be improper.

And, on the facts stated in the case, suppose X had diverted trust funds into the payment of premiums while in New York. Would the cestuis be permitted to trace those funds and reach them out of the proceeds of the insurance? Every respectable authority would answer that question in the affirmative.⁷¹ No problem of constitutional violation would arise even if the rule were incorporated into a New York statute. That, the gloss would run, was solely a question of title. But, on the same plane, how much less a question of title is it if the New York statute admeasures the amount a New York resident may pay for insurance for his wife's benefit, and how much for his creditors?⁷² There appears to be no rational distinction.

Strangely enough neither counsel in the various appeals, nor the courts, referred to *Tuthill v. Goss*.⁷³ Yet that case was precisely in point. There X insured his life before becoming a resident of New York. He paid premiums, after he became a New York resident, in excess of the \$500 annual minimum. On his death creditors sued to obtain the statutory relief. A demurrer to the complaint was overruled, the court saying:

"As to the second cause of action, it may be conceded that our statute has no extraterritorial effect. But this admission is not fatal to the plaintiff's claim. First, it is alleged that the deceased was a non-resident only up to the year 1885. Any payments made by him subsequent to that time in violation of the statute can be recovered. Second, it may well be doubted whether our statute, instead of being restrictive, is not the reverse. *That is to say, the statute gives the wife a title to the insurance as against creditors, which, if it were not for the statute, would be subjected to the claims of creditors.*"⁷⁴ The complaint charges that the deceased was insolvent. The money that was applied to the premiums on the policy belonged to the deceased's creditors, and without the statute they could have followed the fund, and recovered the full amount, or possibly the whole proceeds."⁷⁵

71. See Cohen, *Exemption of Property Purchased with Exempt Funds* (1941) 27 VA. L. REV. 573, 597-603.

72. Reference here is to insurance over which X has complete dominion and the beneficiary merely a "contingent" interest.

73. 89 Hun. 609, 35 N. Y. Supp. 136 (Sup. Ct. 1895).

74. The emphasis is mine. It can't be too strongly emphasized that the net effect of the Verplanck-insurance statutes is to *deprive* creditors of rights which they would have had against the insurance otherwise. The "vested interest" rule does not detract from the historical correctness of the statement. In any event, the general inclusion in contracts of a reserved power to the insured to change the beneficiary has neutralized the vested interest theory. Thus the historical view of the statutes leaves no doubt that they very definitely make inroads upon creditors' rights; are, in practical effect (if not in name) exemptions.

75. *Id.* at 609, 36 N. Y. Supp. at 137. The General Term affirmed, saying that "The opinion at Special Term covers the questions so fully that further discussion is unnecessary."

Even if the contracts be deemed "entire", the New York statute was not "regulating" the contracts. The terms and conditions of the policies were not changed. Payments made in Ohio were not attacked. The statute was only invoked as to acts done in the jurisdiction of the state. Such application was not "extraterritorial".

A measure of the misconception which surrounded the case is indicated by the idea that the wife had a "vested" interest in the policies. She had no such status. On nine of the policies she was not even named the beneficiary until she was a resident of New York. Up to that time those policies were assets of *X*'s estate and subject to the claims of his creditors under the laws of all the states involved. It could not be entirely revolting to all fair minded people to say that *X*'s transfer of his interest to her was subject to the conditions delimited in the New York law. And, implicit in the record is the fact that *X* had the reserved power to cut off her interest in the other policies. If this were so, she was merely a contingent beneficiary. In fact, those policies were *X*'s assets. Under such circumstances they were assets of *X* in New York, when he resided there. It cannot be doubted that New York could validly enact a statute directing that if *X* died leaving insurance to *Y* under policies giving him the power to cut off *Y*'s interest his death without changing the beneficiary should constitute a transfer of the policies from his estate to *Y* as of the moment of death. That would result in the creditor's getting all the proceeds because *X* had committed a fraudulent transfer in New York. If New York could go that far, could it not validly do less?

As a synthesis of conceptions the case is illustrative of (1) the many diverse principles in the conflicts field, (2) the uncertainty of their application, and (3) the great harm to creditors as a result of the present situation.

IV. ADMINISTRATION

The inadequacy of conflicts rules from the creditors' point of view is further revealed, obliquely, in some of the litigations arising after death. While creditors have not been directly involved in all of these cases, the results are such as to injure them further. This phase of the problem starts with the insurance company, rather than the insured, because of multiple jurisdiction. The spread of the insurance business has witnessed the development of statutes, almost universally adopted, which require the company to submit to jurisdiction as a condition of doing business in the various states. *X*, the insured, dies domiciled and resident in Iowa; the policy, one of his treasured documents, is physically

present in Iowa. The insurer is a New York company.⁷⁶ Suppose the policy is payable to X's estate. Who will collect on the policy, and where?

Obviously X's administrator appointed in Iowa will appear to be the logical person to sue and collect on the policy. But that answer (it only *seems* correct), as a minute's reflection will show, depends on jurisdiction over the company being obtained in Iowa. Before jurisdiction began to walk (via the doing business acts) suit would have been necessary in New York, and in that case, an ancillary administrator appointed in New York would have been the logical one to sue.⁷⁷ This would have been true because the insurance relationship was "assets" in New York where the debtor (the insurance company) resided.⁷⁸

Accordingly, the "policy" is still "assets" in New York even after jurisdiction has ambled; as a matter of fact, it is (by the same token) "assets" wherever the company could be served.⁷⁹ We still have no problem. That is created by both a New York administrator and an Iowa administrator suing the company. In either, or both, suits the company interposes as a defense the suit pending in the other jurisdiction on the same policy. Which administrator will succeed?⁸⁰ According to Woerner,⁸¹ the Iowa administrator should succeed, but on the principle of "comity", a very thin support for such a superstructure. Actually, a large group of cases seem to rest entirely on the physical

76. *Insurance Company v. Lewis*, 97 U. S. 682 (1878); *Cramer v. Phoenix Mutual Life Ins. Co. of Hartford, Conn.*, 91 F. (2d) 141 (C. C. A. 8th, 1937).

77. See, e. g., *Equitable Life Assurance Society v. Vogel's Exec.*, 76 Ala. 441 (1884).

78. *Ibid.*

79. *New England Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138 (1884); cf. *Gordon v. Shea*, 300 Mass. 95, 14 N. E. (2d) 105 (1938), (1939) 23 MINN. L. REV. 221; *Robinson v. Carroll*, 87 N. H. 114, 174 Atl. 772, 94 A. L. R. 1437 (1934); *New York Life Ins. Co. v. Public Trustee* [1924] 2 Ch. 101, (1925) 25 COL. L. REV. 366; (1925) 10 CORN. L. Q. 360; (1924) 37 HARV. L. REV. 909; (1924) 33 YALE L. J. 877; see Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation* (1918) 31 HARV. L. REV. 905, 908: ". . . the more accurate view, [is] that the situs of a debt is wherever the debtor can be found. . . ."

80. For practical purposes the special Federal Interpleader statute (28 U. S. C. A. § 41 (26) (1927)) obviates the former difficulty of conflicting jurisdiction as far as the insurance company is concerned. This, however, does not render less pertinent the discussion in the text: the rights of the respective parties to the various suits against the company before interpleader is brought is not affected by the bill. Hence if X sues the company in State B and the company interpleads X and Y, the question of which exemption law is applicable is determined by factors entirely apart from the bill of interpleader: cf. *Sanders v. Armour Fertilizer Works*, 292 U. S. 190 (1934).

81. 2 WOERNER, *AMERICAN LAW OF ADMINISTRATION* (3d ed. 1923) § 205: "So the place where a life insurance company has an office and an agent upon whom process may be served is the situs of property so as to support administration on the estate of the assured, although domiciled in another State at the time of his death, if the policy of insurance was located in the State granting the letters; and if suit be instituted on the policy, and subsequently letters be granted to an administratrix in the State where the company has its home office, the principle of comity between States calls for the refusal on the part of the courts of the latter State to entertain jurisdiction of a second suit for the same indebtedness. . . ."

location of the policy as determining who should have the "right" to sue; e. g., if it is found in Iowa, the representative appointed there is allowed to carry through his action.⁸² This is not determinative,⁸³ however, and, for example suit has been allowed by a New York Court where the policy is located in Connecticut.⁸⁴

Comity, sometimes, ignoring the existence of the "policy" (the paper) as the guiding factor, relies on a sort of "first come, first served" rule; i. e., if suit is first started in Washington, then New York will bow itself out,⁸⁵ a gentlemanly gesture⁸⁶ to the Washington courts.

82. *Shields v. Union Central Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951 (1896); *New York Life Ins. Co. v. Smith*, 67 Fed. 694 (C. C. A. 9th, 1895); cf. *Merrill v. New England Mutual Life Ins. Co.*, 103 Mass. 245 (1869). See (1939) 23 MINN. L. REV. 221, wherein the author, after reviewing the various ways in which the problem has been treated by the courts, suggests that the answer "should be determined by the terms of the contract of insurance . . ." and if possession of the policy is a condition to recovery, then the "chase in action" should be regarded a "mercantile specialty" and, "hence an asset for purposes of administration only in the state where the policy is located; but if the right on the policy is . . . enforceable without possession of the instrument, that right should be regarded as in the nature of a single chose in action and hence an asset for purposes of administration in the state of the debtor's domicile, or in the case of a debtor corporation, in any state in which that corporation is amenable to process." The difficulty with this theory is: (1) it sets up a test which is divorced from reality. Suits can be instituted without the paper policy: the company has a duplicate (2) the "test" would still leave the rights of creditors as much confused as now. Another view would limit the forum of suit to the jurisdiction wherein the policy was located at death. See BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) §471.10, wherein the author indicates that insurance policies are "in fact used in business as mercantile specialties . . ." and that "A complete acceptance of the mercantile view in dealing with the policy of insurance would mean that the chose in action embodied in the policy is assets for administration only in the jurisdiction where the policy is situated at the death. . . ." It should be noted quite carefully that the learned author does not make any allowance for policies moved after death to favorable *fori*, nor does he discuss the matter. While the *Ellis* case (note 87 *infra*) is relied on, so also is the *Rice* case; and there the policy after death was shipped out of the state of domicile.

83. *Searles v. Northwestern Mutual Life Ins. Co.*, 148 Iowa 65, 126 N. W. 801, (1910) (insurance issued on X's life payable to his estate while resident of Iowa; later while resident of Missouri, X assigns policy to S, in Connecticut. On X's death, S sued defendant in Connecticut, where policy apparently was located. X's administrator sues on policy in Iowa. Held: suit allowed, without discussion as to situs of policy as determining factor); *Mayo v. Equitable Life Assurance Society*, 71 Miss. 590, 15 So. 791 (1893) (situs of policy in Mississippi not sufficient to justify suit); *Moise v. Mutual Reserve Fund Life Ass'n*, 45 La. Ann. 736, 13 So. 170 (1893); *Travelers Insurance Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060 (1896), X died a resident of Ohio. He had insured his life for the benefit of his estate and mailed policies to his wife who resided in New Jersey. Held: New Jersey administratrix can sue. The court was astute to discover a gift to the wife. But how much was it influenced by the size of creditors' claims (great in Ohio, slight in New Jersey)?

84. *Steele v. Connecticut General Life Ins. Co.*, 31 App. Div. 389, 52 N. Y. Supp. 373 (4th Dep't. 1898), *aff'd mem.*, 160 N. Y. 703, 52 N. E. 1123 (1899).

85. *Sulz v. Mutual Reserve Fund Life Association*, 145 N. Y. 563, 40 N. E. 242 (1895). Here the policy was actually located in Washington, but the New York Court emphasized the prior commencement of the action in Washington as one of the material facts involved in reaching its decision.

86. Prior commencement of suit, however, is not always determinative. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308 (1902) (first suit begun in New York; no defense to action in Hawaii). However, if the insurance company pays the administrator in one of the suits, it is a good defence to the other action begun by another administrator on the same policy: *Brown v. Equitable Life Assurance Society*, 112 Fed. 845 (S. D. N. Y. 1902). But cf. *Steele v. Connecticut General Life Ins. Co.*, 31 App. Div. 389, 52 N. Y. Supp. 373 (4th Dep't. 1898), *aff'd mem.*, 160 N. Y. 703, 52

Behind all this flubdubbery there can be found real people trying to obtain one another's money (creditors are included). If, for example, *X* had creditors in New York and died in Iowa, leaving a widow and children together with a policy payable to his estate, there would be a real motive behind the appointment of a New York representative; if the Iowa representative got the funds the New York creditor could whistle for his money. Moreover, if the rule which determines by the presence of the paper policy the right to sue be comical, consider this: a New Jersey widow could take the policy, go to some favorable jurisdiction with a gently sheltering statute and collect there, to the great dismay of her local creditors⁸⁷ and those of the decedent.

On the American⁸⁸ scene, then, we find that our problem has two aspects: the first, arising out of an ambulatory jurisdiction, involves the matter of who can sue the company and where the suit is to be

N. E. 1123 (1899), note 84 *supra*. *Contra*: McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 64 Pac. 103 (1901).

87. Northwestern Mutual Life Insurance Co. v. Johnson, 275 Fed. 757 (C. C. A. 8th, 1921); Rice v. Metropolitan Life Ins. Co., 152 Ark. 498, 238 S. W. 772 (1922); Shields v. Union Central Life Ins. Co., 119 N. C. 380, 25 S. E. 951 (1896). *Contra*: Ellis v. Northwestern Mutual Life Insurance Co., 100 Tenn. 177, 43 S. W. 766 (1897). Here the widow of an Alabama resident (where the statute favored creditors) took the policy and scurried to Tennessee (where the statute favored her). *Held*: the proceeds must be distributed accordingly to Alabama law—otherwise all principles of comity would be destroyed. *Accord*: Hyder v. Hyder, 16 Tenn. App. 64, 66 S. W. (2d) 235 (1932). *Consider*, however, the facts in John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178 (1936). Insurance issued to *X* for benefit of wife *Y* while resident of New York. After *X*'s death *Y* removes to Georgia. Suit against company started there.

88. To add an exotic sauce to our dish, consider three Australian cases. In *Re Flood* [1933] S. A. S. R. 203, *X* died leaving an insolvent estate, with debts in New Guinea (and no assets) insurance funds in Queensland (wherein creditors had some rights) with no local debts and more insurance in South Australia (where creditors had no rights at all), with no local debts. The Queensland administrator forwarded his insurance funds to South Australia. *Quare*: did the Queensland statute govern in the South Australian administration as to the Queensland insurance funds? The court elaborated with learned distinction on the general rules: that administration is governed by the *lex fori*; that the matter of what assets go to pay creditors is a matter of administration; that, therefore, as to the Queensland policy moneys the question, governed by conflicts rules, required the South Australian administrator to administer as Queensland law required. But, the court held that the local statute (of exemption) was so broad, so general that it applied to insurance wherever taken out. Accordingly the creditors went away empty-handed.

In *Twaddell v. New Oriental Bank*, 21 Vict. L. Rep. 171 (1895), the Victoria court held, to the same effect, that the local exemption act applied to a local debtor's insurance regardless of the law of the original contract.

Finally, in *Public Trustee of New Zealand v. Lyon* [1936] A. C. 166, the Privy Council had before it a case wherein a debtor had insured his life in Scotland for the benefit of his estate, and died in New Zealand, insolvent. Under the law of place of contracting, creditors got the funds. Under New Zealand law, they were exempt from creditors' claims. The court held that New Zealand law governed. It based this decision on a construction of the local statute, which was unlimited, and applied to any insurer, whether, doing business in New Zealand or not. It admitted that if the funds were Scotch assets, to be administered in Scotland, then Scotch law applied, and creditors could reach the moneys. But there was no administration in Scotland, and, it added (by way of dictum): "If (the New Zealand Statute), on the other hand, S. 65, destroys the right or title of the New Zealand creditors as against the policy moneys which form part of the estate of a person domiciled in New Zealand then, even if there had been a Scottish administration, the New Zealand creditors could not have proved in the Scottish administration any claim of debt

brought; the second, arising out of a diversity of local exemptive acts, requires some guiding concept to determine which exemption applies. Practically, both are facets of the same problem; because it means nothing to say that the *lex fori* governs as to exemptions when the beneficiary is allowed a choice of *fori*—of what value is that to the creditor? Difficulties are encountered even in a simple two state transaction. Assume that the policy was issued in New York by a New York company to a New York resident; that the beneficiary, with her policy, is a refugee in Iowa from New York and New York creditors. Should New York creditors be allowed to pursue the refugee who is in Iowa? That would ruin the exemptions determined by the *lex-fori* concept. Moreover, recall *Stark v. Stark*,⁸⁹ where the Iowa court sheltered just such a refugee. Now take the converse case—the policy issued in Iowa to a resident who comes to New York. Will New York law govern? Not if the *Ruggles*⁹⁰ case can prevent it. That would be unconstitutional.

V. SOME FINAL OBSERVATIONS

We have been concerned with four social interests: (1) the creditor-interest in protecting property, (2) the debtor-interest in avoiding obligations, (3) the "State's" concern, by way of exemptions, to put some socialized, spendthrift-trust "mercy" into the private property concept, (4) the Federal concern for a functioning legal institution which will not impair the Union. All four, however, have not worked well together. The creditor-interest has suffered a complete defeat at the hands of the debtor and exemption interests. That defeat has been made a disorderly rout by the Federal interest, under the cloak of conflict of laws.

It is difficult to see how this condition can continue without ultimate harm to the community, if we predicate the future, like the past, on some sort of private property concept. Admittedly, we are dealing with intangibles and matters of faith. Little, if any, reality can be

against the policy moneys." *Id.* at 177. Cf. Falconbridge, *Conflict of Laws; Life Insurance Moneys Not Available for Creditors* (1936) 14 CAN. BAR REV. 509.

Clearly, these decisions reinforce the "exemptions are determined by the *lex-fori*" idea. But they certainly go further. The *Flood* case, for all its dialectics, permitted a local statute to override the *lex fori contractus*. The *Twaddell* decision goes the same way. Noteworthy is the cavalier manner in which this is achieved, by construing the local statute "broadly". Engraft this on the American conceptions and another tool is easily available to apply local exemption laws: the 55a statutes (the former New York Insurance Statute and the various carbon copies thereof in other states) are broad enough to cover insurance wherever written. In addition, the *Lyon* case would use statutes to "destroy" the rights of creditors as against "barring" their remedy. Under this idea an Iowa creditor could not, for example, reach his Iowa debtor's insurance in New York, even though the New York creditors could.

89. 203 Iowa 1261, 213 N. W. 235 (1925), cited p. 41 *supra*.

90. *Ruggles* case, cited p. 49 *supra*.

grasped in attempting to draw "conclusions". It is the writer's opinion that the "free" economy which we are thought to enjoy is damaged by the freezing of large amounts of property in exempt insurance. Others may not find it so. But, granted some measure of right, the creditors' interest is not incompatible with a reasonable, limited insurance exemption.

That would leave the conflict of laws questions to be solved. Under the present system it seems unlikely that the courts will retrace their steps and reconsider the problems moderately, with some regard for the creditor. The problem might be adequately solved by Federal regulation of legal incidence. Whether that can be achieved is a political matter. But as such a matter, it is important to bear in mind that there is riding with every case the idea of democratic survival. We live if our institutions function adequately, properly, and with due regard to all social interests. There is inadequacy in the picture of the distraught tort-creditor prevented from collecting a lawful judgment from a plentifully insured debtor. It is merely ironical that her predicament is caused by the same court which rendered judgment directing the wrongdoer to pay. This picture merely emphasizes one aspect of a very bad situation. The rest, the harm to the "State" caused by the withdrawal of funds from free enterprise, remains a matter of political and religious faith. In any event, it is indicated that situation should be re-ordered with due regard to all interests involved. Since the judges have abdicated, and the insurance institution is too big for the states, Federal intervention and regulation seem to offer the only solution.